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No. 89-5327

IN THE

Supreme Court of the United States

October Term, 1989

THOMAS N. SCHIRO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1. Whether the Indiana Supreme Court is competent to determine the effect, if any, of a jury's silence on one count of a capital prosecution upon the sentence for another count.

2. Whether the jury's silence on one count of a capital prosecution operates as an acquittal of any elements of such count that are also elements of aggravating factors under a State's death penalty statute.

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REASON WHY THE WRIT SHOULD NOT ISSUE: THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION

This is the third time this case has come before this Court. Petitioner's conviction and sentence of death was affirmed by the Indiana Supreme Court, *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983), *cert. denied*, 464 U.S. 1003. Petitioner then sought post-conviction relief which was denied, *Schiro v. State*, 479

N.E.2d 556 (Ind. 1985), *cert. denied*, 475 U.S. 1036. The instant petition for writ of certiorari arises from the denial of Petitioner's second attempt to obtain post-conviction relief. The opinion of the Indiana Supreme Court, reproduced in the Appendix to Petitioner's Brief, is reported as *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989).

Petitioner was charged with the murder of one Laura Luebbehusen. Three counts were brought: (1) murder; (2) murder committed while committing or attempting to commit rape; (3) murder committed while committing or attempting to commit criminal deviate conduct. The jury found petitioner guilty of murder while committing or attempting to commit rape and returned no verdict on the other two counts. After the penalty phase, the jury recommended against the death penalty, but the trial judge overrode the jury's recommendation and sentenced Petitioner to death.

Petitioner's argument is essentially that the jury's silence on the charge of murder (as opposed to the guilty verdict on the felony murder/rape charge) operates as an acquittal on that charge. Since one of the elements of murder under IND. CODE § 35-42-1-1(1) is a knowing state of mind, Petitioner reasons that the silent verdict operates as a finding that he did not possess the *mens rea* requisite to that offense. And since the aggravating circumstance the State charged in its death penalty allegation under IND. CODE § 35-50-2-9(b)(1) was the *intentional* killing of the victim while committing rape, Petitioner concludes that, lacking the "knowing" *mens rea* required for murder, he cannot be found to have possessed the "intentional" *mens rea* required for imposition of the death penalty. As authority for his position he relies on *Bullington v. Missouri*, 451 U.S. 430 (1981).

Petitioner's argument is incorrect for two reasons: (1) the Indiana Supreme Court has already determined that the jury's silence on murder did not operate as an acquittal on that count; and (2) even if it did, it did not operate as a finding that the

underlying elements were nonexistent so as to preclude the imposition of the death penalty.

It is true, of course, as Justice DeBruler of the Indiana Supreme Court pointed out in his dissent, that usually in Indiana the jury's silence on one count is the equivalent of an acquittal on that count. *Buckner v. State*, 248 N.E.2d 348 (Ind. 1969); *Smith v. State*, 99 N.E.2d 417 (Ind. 1951). There is, however, an exception to this rule. The rule does not apply where the multiple counts are "merely different charges of the same offenses." *Cichos v. State*, 208 N.E.2d 685 (Ind. 1965). The dissent in the instant case attempted to distinguish *Cichos*, but the majority was not persuaded. Noting the inapplicability of the rule which holds that conviction of a lesser included offense constitutes an acquittal of the greater offense, the majority opinion stated that:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, *it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider.* 533 N.E.2d at 1208 (emphasis supplied).

Thus the Indiana Supreme Court has determined that the jury's silence on the murder count cannot be taken as a finding that the elements of that count did not exist. Determining the effect of a jury's silence in a state court system is clearly a determination of state law, and the Indiana Supreme Court's determination of this question constitutes an independent state ground not subject to review in this Court. Necessarily, therefore, the jurisdiction of this Court fails. *Michigan v. Long*, 463 U.S. 1032, 1038 fn.4 (1983); *Fox Film Corporation v. Miller*, 296 U.S. 207 (1935). Petitioner's argument depends upon the assumption that the jury's silence operated as an acquittal; since that question has been determined adversely to Petitioner by the highest court competent to do so, his argument evaporates, and no federal question is presented to this Court.

Petitioner's argument would fail, moreover, even if the jury's silence on the murder charge were deemed to operate as an acquittal of that charge. His reliance on *Bullington*, *supra*, is misplaced. In *Bullington*, the Missouri jury had the choice of imposing either death or life imprisonment and chose life imprisonment. Upon retrial (after reversal on grounds not relevant here), the prosecution indicated an intention to seek the death penalty a second time. This Court held that the jury's decision in the first trial constituted an acquittal for insufficiency of evidence of whatever was necessary to impose the death penalty, that is, it was a finding that the State had failed to prove its case. A retrial of the death penalty was therefore barred by the double jeopardy clause.

This case is not comparable to *Bullington*. In *Bullington*, the ultimate responsibility for the death penalty decision lay with the jury; the Missouri statute provided that "The judge shall impose the sentence fixed by the jury." 451 U.S. at 433, fn.4. (In Indiana, the jury's determination on penalty is advisory; the judge can override it). The jury decision set up as a double jeopardy bar to a future attempt to obtain the death penalty was in fact a decision on the very death penalty count which the State sought to retry. The jury decision which Petitioner attempts in the instant case to set up as a bar to the death penalty is not a decision on the death penalty, but a decision on a count other than the one upon which he was convicted. His argument is really that acquittal on the other count is logically inconsistent with the finding of the aggravating circumstance necessary to impose the death penalty for the count upon which he was convicted. Thus this case is really an "inconsistent verdict" case with a twist: instead of arguing that acquittal on Count I is inconsistent with guilt on Count II, Petitioner argues that acquittal on Count I is inconsistent with the imposition of the death penalty on Count II. The argument is unconvincing.

In *United States v. Powell*, 469 U.S. 57 (1984), a case dealing with allegedly inconsistent jury verdicts, this Court stated

that "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. . . . This review should be independent of the jury's determination that evidence on another count was insufficient." 469 U.S. at 67. *Bullington* depended on the notion that the jury's rejection of the death penalty constituted a finding that there was insufficient evidence to prove the State's claim on the death penalty issue. Under *Powell*, *supra*, an acquittal on Count I herein is irrelevant to a sufficiency review of conviction on Count II. There is no reason why it should not also be irrelevant to a sufficiency review of the penalty imposed under Count II. "Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted." *Powell*, *supra*, at 369 U.S. 69. The State would simply add that the burden of conviction includes the possible penalties, and in the instant case includes the death penalty.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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